

[ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 11, 2006]

No. 06-5126

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SANDRA K. OMAR, et al.,
Petitioners-Appellees,
v.

FRANCIS J. HARVEY, Secretary of the United States Army, et al.,
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JA Joint Appendix

MNF-I Multinational Force - Iraq

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners cannot point to any example where *any* court in our Nation's history has ever imposed an injunction remotely similar to the one imposed by the district court here. The district court enjoined United States military and multinational forces engaged in ongoing combat operations and related missions in a foreign country – operations undertaken pursuant to a mandate from the United Nations Security Council issued at the foreign country's request – from cooperating with local government authorities concerning the detention and prosecution of a captured enemy combatant for offenses committed in that foreign country. That order is not only

unprecedented, but directly contravenes the precedents of the Supreme Court and this Court, and fundamental principles of judicial restraint.

As we explained in our opening brief, the district court's injunction (1) contravenes binding Supreme Court and Circuit precedent establishing that United States courts lack jurisdiction over multinational forces acting pursuant to the auspices of an international body – in this case, the United Nations Security Council, see *Hirota v. General of the Army MacArthur*, 338 U.S. 197 (1949); *Flick v. Johnson*, 174 F.2d 983, 983 (D.C. Cir.), *cert. denied*, 338 U.S. 879 (1949); (2) improperly thrusts the courts into quintessentially political questions implicating sensitive and vital Executive functions in the areas of warmaking, national security, and foreign affairs; and (3) exceeds the limitations on judicial relief inherent in the writ of habeas corpus and Article III of the Constitution by enjoining the very relief to which Shawqi Omar might be entitled under habeas – namely release from the custody of U.S. and multinational forces in Iraq and potential transfer to Iraqi authorities – in a misguided effort to prevent Omar's habeas action from becoming "prematurely moot."

Petitioners' arguments in support of the district court's unprecedented injunction are unavailing. In seeking to evade *Hirota*, petitioners mischaracterize our position, misquote our opening brief, and misstate several Supreme Court decisions. Moreover, petitioners fail to identify any meaningful distinction between *Hirota* and this case.

As in *Hirota*, Omar is being held by United States armed forces operating abroad, under authority flowing from an international body. Nor is there any basis to conclude, as petitioners argue, that *Hirota* has been implicitly overruled or undermined by subsequent Supreme Court decisions. Only the Supreme Court can overrule *Hirota*, and it has not done so.

With regard to the political question doctrine, the Supreme Court has set forth six factors, any one of which can render a matter non-justiciable. See *Baker v. Carr*, 369 U.S. 186 (1962). Although our opening brief spelled out in detail how *each* of those six factors is met here (see Gov't Br. 43-55), petitioners' brief does not engage in any meaningful analysis of them. Instead, petitioners contend, without supporting precedent, that unresolved questions of fact preclude application of the doctrine. But the political question doctrine applies at the pleading stage and need not await factual determinations that would require precisely the sort of judicial inquiry that the doctrine is designed to avoid. Similarly, petitioners' contention that the doctrine does not apply to claims of due process deprivations is contrary to the decisions of both the Supreme Court and this Court. Thus, straightforward application of the political question doctrine, and constitutional separation of powers principles, mandate dismissal of the petition here.

Finally, since Omar's presence in Iraq was voluntary, he would be subject to Iraqi jurisdiction whether the U.S. and MNF-I forces released him from custody in Iraq or transferred him to Iraqi authorities for potential prosecution. Under those circumstances, transfer to Iraqi authorities would effectively give Omar all the relief to which he might be entitled under habeas, namely release from MNF-I custody. Petitioners concede that the courts could not enjoin Omar's outright release in Iraq, nor preclude Iraqi authorities from exercising jurisdiction over him, and petitioners provide no reason why Omar's transfer to Iraqi authorities, given his voluntary presence in Iraq, should be treated differently. The district court order enjoining Omar's release to Iraqi authorities for prosecution of crimes committed in Iraq is, in short, not only unprecedented, but entirely unfounded. It should be reversed by this Court.

ARGUMENT

I. **THE DISTRICT COURT LACKED JURISDICTION BECAUSE OMAR IS HELD BY UNITED STATES MILITARY OFFICERS ACTING AS PART OF THE MULTINATIONAL FORCE-IRAQ UNDER AUTHORITY OF THE UNITED NATIONS SECURITY COUNCIL.**

Our opening brief (at 21-32) explained that this case is governed by *Hirota v. General of the Army MacArthur*, 338 U.S. 197(1948), in which the Supreme Court ruled that federal courts lack jurisdiction to hear habeas corpus claims brought by individuals held under the authority of an international tribunal, even though those

individuals were in the custody of United States military officers. The Supreme Court's decision in *Hirota* – which this Court itself has recognized and applied, *Flick v. Johnson*, 174 F.2d 983, 983 (D.C. Cir.), *cert. denied*, 338 U.S. 879 (1949), discussed on page 9, *infra* – dictates dismissal here because Omar is being held by United States military officers acting as part of the Multinational Force-Iraq ("MNF-I"), which derives authority from resolutions of the United Nations Security Council. Although petitioners assert (at 29-36) that *Hirota* and related precedents are inapplicable or can be ignored, their arguments are mistaken.

A. Petitioners attempt to avoid *Hirota* by falsely representing that the Government's opening brief concedes that the United States, rather than the MNF-I, holds Omar. See Pet Br. 5, 15 n.2. No such concession was made. Directly to the contrary, our opening brief specifically stated that "Omar is currently in MNF-I custody." Gov't Br. 10; accord Gov't Br. 26, 49, 54. These statements reflect the understanding that "Omar is being held by United States military officers, but they are acting as part of an international body – the MNF-I – which derives authority from United Nations Security Council resolutions issued at the request of the sovereign

Government of Iraq." Gov't Br. 15-16. Similar statements in our opening brief abound, and nothing in that brief is to the contrary.¹

Petitioners strikingly misquote our opening brief, incorrectly claiming that it twice contains the following language, which Omar purports to quote: "[Mr.] Omar is being held by the United States." Pet Br. 5 & 15 n.2 (purporting to quote pages 15 and 32 of our opening brief). In fact, the cited pages of our brief do not contain the language supposedly quoted by petitioners, and, instead, convey a very different meaning. See Gov't Br. 15 ("Omar is being held by United States military officers, but they are acting as part of an international body."); Gov't Br. 32 ("Omar is being held by United States military personnel under the auspices of a multinational force that is distinct from the United States military and ultimately derives its existence from an international body."). Petitioners cannot evade the applicability of *Hirota* by making false representations to this Court regarding the contents of our brief.

B. In addition to misquoting our brief, petitioners attempt to distinguish *Hirota* by noting that Omar is a United States citizen. Pet Br. 22. But, as our opening brief explains (at 27), the text of *Hirota* reveals that the petitioners' citizenship was not relevant to the outcome for the Supreme Court majority. Petitioners respond by

¹ Gov't Br. 21-22 (Omar "is being held by United States forces acting as part of the MNF-I"); accord Gov't Br. 25, 30, 32.

asserting that citizenship was relevant to a *different* Supreme Court decision. See Pet Br. 22 (suggesting that citizenship was one of six factors deemed relevant in *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)).

Petitioners cannot escape that the decision in *Hirota* by its terms is based solely on the fact that the detention (and impending execution) of the petitioners there was by authority of an international tribunal. 338 U.S. at 198. Petitioners cite no case declining to apply *Hirota* to United States citizens, in contrast to our opening brief, which cited several judicial decisions refusing to hear habeas challenges brought by United States citizens because they were being held pursuant to the legal authority of non-U.S. entities. See Gov't Br. 29-30.

Petitioners briefly attempt (at 22) to distinguish *Hirota* on the ground that *Hirota* had already been convicted by a military tribunal, whereas Omar has not been convicted. That argument is similarly unavailing because *Hirota* was being detained as a war criminal after the cessation of hostilities, while Omar is being detained as an enemy combatant during an ongoing war. In each case the relevant determination (that *Hirota* was a war criminal and that Omar is an enemy combatant) was made by a military tribunal acting under the auspices of an international force.²

² As we explained in our opening brief (at 8-9), a three-member panel of the MNF-I, convened consistent with Article V of the Geneva Convention (which the Government has consistently stated applies to the conflict in Iraq), determined, *inter alia*, that

C. Petitioners also try to evade *Hirota* by contending that it was "focused on solely the Supreme Court's jurisdiction" (Pet Br. 22), and therefore has no bearing on district court jurisdiction, see Pet Br. 10-11, 21, 29, 32. That argument is directly contradicted by *Hirota* itself.

Rather than limiting its holding in *Hirota* to its own original or appellate jurisdiction, the Supreme Court made clear that *no* federal court had jurisdiction over the habeas petitions at issue by specifically stating that "the courts of the United States" had no power to grant the writ under the circumstances presented. 338 U.S. at 198. The opinion therefore expressly encompasses *all* federal court jurisdiction. For this reason, petitioners' suggestion that *Hirota* should be read narrowly in light of prior Supreme Court decisions that petitioners claim did turn on limitations of the Supreme Court's original jurisdiction is unavailing. See Pet Br. 31 (citing *Everett ex rel. Bersin v. Truman*, 334 U.S. 824 (1948) (motion denied by an equally divided court), and *Ex parte Betz*, 329 U.S. 672 (1946)). Whatever else may be true of those cases, they cannot limit the Court's subsequent holding in *Hirota*, which expressly referred to the jurisdiction of all United States courts.

Omar is an enemy combatant. Omar was present at the hearing and had the opportunity to make a statement and to call immediately-available witnesses. Thus, Omar has received the process called for by the law of war (including Article V of the Geneva Convention) for a combatant who is merely being detained during an ongoing war.

Moreover, petitioners' argument runs headlong into precedent of *this Court*, which confirms that the rule of law used in *Hirota* applies to district court jurisdiction as well. The year after *Hirota* was decided, this Court followed *Hirota* in holding that a *district court* lacked jurisdiction over a habeas action brought by an individual "in custody in Germany, within the American Zone of Occupation, * * * under custody of American Army forces." *Flick*, 174 F.2d at 983. This Court interpreted *Hirota* as precluding jurisdiction by *any* United States court over a habeas claim brought by a person held in the physical custody of United States military officers under the authority of an international entity (in *Flick*, the Allied powers occupying Germany). 174 F.2d at 984-86. In light of *Flick*, adopting petitioners' position would require this Court not only to disregard the Supreme Court's precedent, but Circuit precedent as well.

Petitioners also incorrectly describe this Court's jurisdictional holding in *United States ex rel. Keefe v. Dulles*, 222 F.2d 390, 391-92 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 952 (1955), which we cited in our opening brief (at 29) for the proposition that there is no jurisdiction to review a detention under the authority of a non-American tribunal. Petitioners mistakenly state that "this Court exercised habeas jurisdiction" in *Keefe*. Pet Br. 17 n.4. Instead, this Court in *Keefe* affirmed the judgment of the district court, which expressly held that it was "without jurisdiction to issue a writ of

habeas corpus." 222 F.2d at 391-92; see also *id.* at 392 (noting that it was necessary to "dismiss the petition," rather than deny it).

D. Petitioners also argue that subsequent events reveal that the Supreme Court has implicitly overruled or undermined *Hirota*. See Pet Br. 24 (contending that *Hirota* "lacks vitality today"); Pet Br. 33 (arguing that the concurring views of Justice Douglas, rather than the Court's opinion in *Hirota* "eventually prevailed"). As discussed in our opening brief (at 30-32), this argument fails for the basic reason that only the Supreme Court can overrule or undermine its own precedents; other courts cannot do so, especially not, as petitioners urge, based on inferences derived by cobbling together portions of subsequent opinions. See Gov't Br. 31 (collecting cases). The Supreme Court has never expressly (or even implicitly) called its holding in *Hirota* into doubt, much less overruled it. *Hirota* therefore remains binding on this Court. So too, this Court has never reconsidered or overruled its decision *Flick* – faithfully applying *Hirota* – and that decision therefore remains binding on this panel as well.

In any event, petitioners' contention that subsequent cases implicitly undermine *Hirota* fails. Petitioners, for example, assert (at 33) that the applicability of *Hirota* to district courts was based on that opinion's reliance on a reading of *Ahrens v. Clark*, 335 U.S. 188 (1948), that has since been discredited by the Supreme Court in

Rumsfeld v. Padilla, 542 U.S. 426 (2004), and other cases. See Pet. Br. 33 (stating that "the High Court [in *Hirota*] reminded petitioners of *Ahrens*'s bar to lower-court jurisdiction"). But the Supreme Court's decision in *Hirota* does not mention or refer to *Ahrens* in any way. See 338 U.S. at 198. Moreover, this Court's decision in *Flick* negates any possibility that *Hirota*'s holding with respect to district courts was based on any perceived limitation on their territorial jurisdiction. This Court in *Flick* reiterated its conclusion that a district court could, under proper circumstances, exercise habeas corpus jurisdiction with respect to a petitioner detained abroad (see 174 F.2d at 983 ("Germans in military custody in the American zone of occupation in Germany, serving sentences of a United States Military Commission, and thus in custody under or by color of the authority of the United States * * * may sue for the writ in the District of Columbia.")), but followed *Hirota* in holding that the district court lacked jurisdiction over an individual detained abroad by United States military officers under the authority of an *international entity*. Accordingly, both *Hirota* and this Court's prior precedent – both of which are binding on the Court – make clear that *Ahrens* is irrelevant to the jurisdictional question at issue.

Petitioners nevertheless contend that their revisionist interpretation of *Hirota* is bolstered by Justice Douglas' concurring opinion in that case. Unlike the majority opinion in *Hirota*, Justice Douglas did address *Ahrens* and represented his personal

view that district courts could have jurisdiction under certain circumstances. See Pet Br. 31 (citing 338 U.S. at 199-201 (Douglas, J., concurring)). Of course, that concurring opinion does not assist petitioners' legal arguments because the Court's majority opinion pointedly did *not* adopt that approach.

Petitioners note (at 31-32) that the Government's brief in *Hirota* had pointed to the lack of original jurisdiction over the action and the lack of territorial jurisdiction of district courts under *Ahrens*. But, rather than address those arguments, the Supreme Court adopted a different argument from the Government's brief, namely that, given the international character of the forces and tribunal at issue, the habeas petition was "undisputably beyond the competence of *any* American court." Nos. 48-239, 240 & 248 Misc. Gov't Br. 71 (emphasis added); accord 338 U.S. at 198.

Petitioners also contend that the Supreme Court has acted inconsistently with *Hirota* by exercising jurisdiction in habeas cases arising in occupied Germany, Korea, and Afghanistan, and which therefore involved "international entanglements." Pet Br. 28; see *id.* at 23-28. But *Hirota* does not preclude jurisdiction in every case involving an international dimension. Rather, the holding of *Hirota* is more limited and sensible: there is no habeas corpus jurisdiction when a petitioner is held under authority flowing from the auspices of an international entity, rather than from the United States alone. Each of the three primary cases cited by petitioners is fully

consistent with this holding because, in each of them, unlike *Hirota* and unlike this case, the authority for the detention of the petitioner flowed exclusively from the United States Government and its laws.

In *Madsen v. Kinsella*, 343 U.S. 341, 342-43 (1952), for example, the question was whether the petitioner, "seeking her release from the Federal Reformatory for Women in West Virginia," had been properly convicted by the United States Courts of the Allied High Commission for Germany, previously known as the "United States Military Government Courts for Germany." *Id.* at 357. As the opinion makes clear, the tribunals derived their authority from the Constitution and laws of the United States. See, e.g., *id.* at 356, 357 (describing the tribunals as being "in the nature of military commissions conforming to the Constitution and laws of the United States" that "derived their authority from the President as occupation courts, or tribunals in the nature of military commissions, in areas still occupied by United States troops"); *id.* at 358 (noting that the judges' authority stemmed from "the President").³

Thus, the federal courts had jurisdiction over the petition in *Madsen* because that petition alleged detention by the United States Government within the sovereign

³ Nor did the fact that the tribunals applied German law give them any international imprimatur. Rather, "[t]he applicability of the German Criminal Code to petitioner's offense springs from its express adoption by the United States Military Government." 343 U.S. at 361 (citing 12 Fed. Reg. 6997 (1945)).

territory of the United States under authority of a tribunal established by the United States Government. The ruling in *Madsen* therefore in no way undermines *Hirota*.

Indeed, it is worthwhile to compare *Madsen* with *Flick* because both cases involved individuals convicted by courts located in Germany, but reached opposite results. In both cases, the key was the source of authority under which the petitioner was incarcerated. See *Flick*, 174 F.2d at 985 (noting that, where U.S. military officer also has authority pursuant to his title in an international entity, "the nature of the act itself, rather than the title indicated by the document, will best serve to show the true capacity in which the officer was acting").

In *Madsen*, that authority was the judgment of a court that was a product of United States law, and, accordingly, the Supreme Court exercised habeas corpus jurisdiction. In *Flick*, on the other hand, this Court reasoned that United States courts lacked jurisdiction over the habeas petition because the authority for the petitioner's incarceration was the judgment of a court – different from the court at issue in *Madsen* – created under the authority of the "'Control Council' * * * composed of the four Commanders in Chief of the four victorious powers." 174 F.2d at 984. Because authority for Omar's detention by the MNF-I flows from the United Nations Security Council, his situation is like that at issue in *Flick*, and unlike that in *Madsen*.

Similarly, contrary to petitioners' contention (at 25-26), *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), in no way undermines *Hirota*. The *Toth* opinion does not mention or rely in any way on the international nature of the Korean conflict. Instead, the Court noted that Toth was detained for violating 50 U.S.C. §§ 675 & 712 and was to be tried by a United States court-martial exercising jurisdiction under 50 U.S.C. § 553. 350 U.S. at 13 & nn.1-2. The existence of jurisdiction under those circumstances casts no doubt on the Supreme Court's holding in *Hirota*.

Nor does *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (plurality op.), which involved a petitioner held by United States military forces at the Naval Brig in South Carolina, undermine *Hirota*. *Hamdi* does not mention *Hirota*, much less explicitly call it into question. Moreover, *Hamdi* did not present the *Hirota* issue. Petitioners' assertion (at 26) that Hamdi was captured "during Operation Enduring Freedom, a multinational operation under U.N. Charter auspices" misunderstands the Supreme Court's holding in *Hirota*, as well as in *Hamdi*. It is the nature of the *detention* of an individual that dictates the availability of a habeas writ, not the circumstances under which the individual was originally apprehended. Hamdi, for example, was detained at the Naval Brig in South Carolina, and his habeas action was specifically limited to his detention in the United States. Likewise, Hamdi's custodians were not acting as

part of any multinational force or under any source of authority other than the Constitution and laws of the United States.

E. Petitioners' contention (at 13-15) that *Hamdi* and *Rasul v. Bush*, 542 U.S. 466 (2004), stand for the proposition that habeas jurisdiction exists whenever a United States citizen is in the physical custody of U.S. military officers is also mistaken. Not only does *Hirota* unquestionably refute the assertion, but neither *Hamdi* nor *Rasul* -- which did not mention *Hirota* -- stands for such a broad proposition.

Far from being "binding" here (Pet Br. 9), *Hamdi* does not even address the jurisdictional issues presented in this case. It was undisputed that the court had jurisdiction to entertain the habeas petition in *Hamdi* because Hamdi, unlike Omar, was "detained within the United States." 542 U.S. at 510, 525 (plurality op.). (Jurisdiction undisputed because Hamdi was "detained within the United States").⁴

Rasul is similarly inapposite. There was no assertion in that case that the United States military officers detaining the petitioners in the U.S. Navy base in Guantanamo Bay, Cuba, were acting as part of, or under the authority of, any

⁴ Because the Court did not address the undisputed federal court jurisdiction in *Hamdi*, that decision could not provide any binding law on that issue, much less override a prior precedent like *Hirota*. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("The [Supreme] Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions * * * and such assumptions – even on jurisdictional issues – are not binding in future cases that directly raise the questions.").

international entity – and they are not. And the Supreme Court emphasized that these officers were acting in a territory over which the United States exercises "complete jurisdiction and control." 542 U.S. at 480; see *id.* at 481-82 (following common-law precedents suggesting the availability of habeas corpus in areas controlled by the British King). *Rasul's* holding is therefore limited to habeas actions filed on behalf of persons detained by the United States – and not by multinational forces pursuant to the auspices of an international authority – on territory over which the United States exercised complete jurisdiction and control. Both *Hirota* and this case involve persons held in foreign lands not subject to the complete control and jurisdiction of the United States by U.S. military officers acting as part of multinational forces pursuant to authority provided them by an international entity.

The degree of dominion exercised by the United States over the Naval Base at Guantanamo Bay was crucial to the Court's decision in *Rasul*. See 542 U.S. at 482 n.14 (suggesting a different outcome might be appropriate in areas over which the United States government exercises only certain rights of administration and control). And the United States does not possess comparable "complete jurisdiction and control" over Iraq. Petitioners' assertion (at 28 n.7) that "[f]or all practical purpose, the U.S. controls all coalition forces in Iraq" misses the point. Whatever control the United States exerts over MNF-I does not exceed the United States' control during the

time of *Hirota* over the Allied forces in Japan, all of whom answered to the Supreme Commander, Allied Powers, a United States General reporting to the President as Commander-in-Chief of the United States armed forces. See Gov't Br. at 22-25 & nn.3-4. And just as in *Hamdi*, the Court in *Rasul* did not purport to overrule or even question *Hirota*.⁵

II. THE PETITION RAISES NON-JUSTICIABLE QUESTIONS.

A. The district court's injunction interferes with core military determinations in a zone of active combat and with sensitive national security and foreign relations matters related to the rebuilding and supporting of Iraqi political and judicial institutions. It therefore flatly violates settled doctrines governing the constitutional separation of powers, and directly implicates non-justiciable political questions.

This Court's recent decision in *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006), is instructive. See Gov't Br. 44-45. *Bancoult* addressed a claim by residents of Diego Garcia alleging mistreatment by the United States during construction of a military base. The complaint raised serious allegations of misconduct, including

⁵ Petitioners' discussion (at 17-20, 51-55) of Congressional power to suspend the writ of habeas corpus is entirely inapposite. That power is not at issue in this case, just as it was not at issue in *Hirota* or *Keefe*. We do not argue that Congress has suspended the writ of habeas corpus. Instead, we contend only that the writ does not extend to a petitioner detained under the authority of an international body under the undisputed facts of this case.

"forced relocation; torture; racial discrimination; cruel, inhuman, or degrading treatment; genocide; intentional infliction of emotional distress; negligence; trespass; and destruction of real and personal property." 445 F.3d at 431. Nevertheless, despite the serious nature of these allegations, the district court dismissed the action – and this Court affirmed – holding that the courts lacked jurisdiction under the political question doctrine. *Id.* at 432.

This Court listed the six factors to be considered under the political question doctrine, citing *Baker v. Carr*, 369 U.S. 186, 217 (1962), and noted that, "[t]o find a political question, we need only conclude that one factor is present, not all." 445 F.3d at 432 (quoting *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1768 (2006)). After finding that "[t]he instant case involves topics that serve as the quintessential sources of political questions: national security and foreign relations" (*id.* at 433), this Court concluded that the decision to establish a military base on Diego Garcia was not reviewable. *Id.* at 436.

Of considerable relevance here, this Court went on to explain that the *Bancoult* plaintiffs challenged not just the decision to establish a military base, but also the manner in which that decision was implemented, which they contended included genocide and torture. This Court rejected that contention as a basis for exercising jurisdiction: "[T]he policy and its implementation constitute a sort of Möbius strip

that we cannot sever." *Id.* at 436. This Court concluded that "[t]he political branches must 'determine whether drastic measures should be taken in matters of foreign policy and national security,' * * * and the President 'must determine what degree of force [a] crisis demands.'" *Ibid.* (quoting *Schneider*, 412 F.3d at 197, and *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863)).

The decision to execute military operations in Iraq as part of the MNF-I is a quintessential political question. That conclusion also applies to the specific military measures taken in Baghdad – which is currently a central part of the battlefield – to assure the success of those military operations, the safety of American and multinational forces participating in those operations, and the security, stability, and continuity of our relations with the Government of Iraq, with the other countries participating in or supporting the MNF-I, and with the members of the United Nations Security Council, whose mandate the MNF-I is seeking to fulfill. Indeed, the importance of applying the political question doctrine is far greater here than it was in *Bancoult*, which, had it been allowed to go forward, would have involved judicial evaluation of "events occurring forty years ago," 445 F.3d at 429, not events occurring at the heart of a current military operation.

Omar was captured in Baghdad, where foreign terrorists and other insurgents continue to engage United States and multinational forces in deadly combat and

commit savage acts against the Iraqi people and their government. Omar had amassed weapons and Improvised Explosive Device-making materials, was harboring an Iraqi insurgent and four foreign Jordanian fighters, all of whom stated their intent to attack American and multinational forces. He is implicated in planning kidnappings and other offenses in Iraq. See JA 138. The forces that initially apprehended Omar undoubtedly could immediately have handed Omar over to Iraqi authorities without approval by a court in the United States. The fact that Omar continues to be held by United States forces in Baghdad acting as part of the MNF-I because they are being used temporarily to detain individuals facing trial in Iraqi courts does not somehow render justiciable the battlefield decisions of the MNF-I to detain Omar and assist the Iraqi Ministry of Justice in pursuing a criminal investigation and possible prosecution.

Despite the obvious applicability of *Bancoult* and *Schneider* here, petitioners argue that *Hamdi* establishes the inapplicability of the political question doctrine to this case. See Pet Br. 50-51. The *Hamdi* opinions, however, did not specifically address the political question doctrine, and in no way undermine the application of that well-settled doctrine of judicial restraint. Instead, the plurality decided whether separation of powers principles mandated an unusually deferential standard of review. See 542 U.S. at 535-36 (plurality op.). Moreover, the multifaceted separation-of-

powers concerns presented by the district court's unprecedented injunction in this case are substantially greater than those presented in *Hamdi*.

Hamdi was detained by the authority of the United States Government alone within the sovereign territory of the United States, far removed from the dangers of the battlefield on which he was captured. See 542 U.S. at 510. As a result, the warmaking, national security, and foreign relations implications of his detention were fundamentally different and more attenuated than those presented by Omar's detention by the MNF-I in Iraq. See Gov't Br. 44-50. Among other things, Omar's presence in Iraq makes him a direct threat both to the U.S. and multinational forces in Iraq, and to the Iraqi government and its people. His continued detention therefore strongly implicates our relationship with the new sovereign Government of Iraq, on whose territory Omar is being held and whose enemies Omar was harboring at the time of his apprehension. His detention in Iraq also involves our relationship with the other participants in MNF-I (as well as the United Nations Security Council), and his release would endanger their soldiers and civilians as well. *Hamdi* therefore does not undermine application of the political question doctrine and other principles of the constitutional separation of powers under the very different circumstances presented by this case.

Petitioners similarly argue (Pet. Br. 49-50) that the presence of constitutional claims renders the political question doctrine inapplicable. That claim is incorrect. See, e.g., *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004) (affirming the dismissal of Takings Clause claim as a nonjusticiable political question); *Murtishaw v. Woodford*, 255 F.3d 926, 961 (9th Cir. 2001) (denying habeas corpus claim alleging constitutional violation because it raised a nonjusticiable political question), *cert. denied*, 535 U.S. 935 (2002).

Nor does petitioners' assertion of contested facts in this case preclude application of the political question doctrine and related separation-of-powers principles. It did not matter to this Court in *Bancoult* that the plaintiffs' claims of genocide were contested. Nor did it matter in *Schneider* that the plaintiffs' allegations that agents of the United States had kidnaped, tortured, and murdered the decedent were contested. The political question doctrine deals with the nature of the legal question presented and whether a judicial inquiry into that question will offend the constitutional placement of national security and foreign relations authority with the President. Indeed, fact-finding itself would plunge the courts into the very type of judicial inquiry that the political question doctrine is designed to avoid.

The question here is the authority of United States military officers, acting as part of the MNF-I, to detain a person captured on the battlefield in Iraq and accused

of participating in the Iraqi insurgency, harboring insurgents, and planning the kidnappings of foreigners to obtain funds with which to finance that insurgency. It includes the question of whether to turn such an individual over to Iraqi authorities. The applicability of the political question doctrine does not turn on whether the underlying accusations against the detainee are contested.

Petitioners further argue that separation-of-powers principles must be understood to preclude the application of the political question doctrine to habeas petitions because otherwise too much power would be concentrated in the Executive. See Pet Br. 51-55. But the political question doctrine does apply in habeas cases. See, e.g., *Murtishaw*, 255 F.3d at 961 (denying habeas corpus claim alleging constitutional violation because it raised a nonjusticiable political question). Indeed, Justice Douglas' concurrence in *Hirota* (on which Omar relies so heavily, see Pet Br. 31-34, 55) concluded that the federal courts lacked jurisdiction over the petition precisely because it presented a political question. 338 U.S. at 215 (referring to the treatment of Hirota as "a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say").

At bottom, petitioners' argument is actually a criticism of the political question doctrine as a whole. Since the Supreme Court has instructed the federal courts on the proper application of the political question doctrine (see e.g., *Baker v. Carr*, 369 U.S.

186 (1962)), the only real question is whether any of the *Baker* factors applies here. The applicability of each *Baker* factor is addressed at length in our opening brief (at 42-55), but is largely ignored in Omar's brief.⁶

B. In suggesting that the district court appropriately enjoined Omar's transfer to Iraqi custody, petitioners repeatedly refer (at 36-45) to the limited judicial review available to persons detained *within the United States* awaiting extradition and to the statutory and treaty authorities for such extraditions. But because Omar was captured in Iraq – where he voluntarily resided – and is being held in Iraq, this case does not involve an extradition. See Gov't Br. 40. This distinction destroys petitioners' reliance on cases and principles plucked from the extradition context.

While petitioners cite cases stating that either statutory or treaty authority is necessary for an extradition, the opposite is true with respect to turning over to a foreign government an accused individual on that government's sovereign territory. In that situation, the foreign sovereign's right to the detained individual is presumed. See *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) ("The

⁶ Petitioners also imply that the application of the political question doctrine here would constitute a suspension of the writ of habeas corpus and therefore requires Congressional action. See Pet Br. 51-55. But because the political question doctrine is itself a constitutionally-based limitation on the authority of the courts (see, e.g., *Baker*, 369 U.S. at 210; *Schneider*, 412 F.3d at 193), it operates independently of any Congressional action.

jurisdiction of the nation within its own territory is necessarily exclusive and absolute."); *Holmes v. Laird*, 459 F.2d 1211, 1216 (D.C. Cir.) (in extradition case, noting that "had appellants been present in West Germany as militarily-unattached civilians, an exercise of West German criminal jurisdiction over them would indubitably have been appropriate"), *cert. denied*, 409 U.S. 869 (1972). Indeed, the Supreme Court has declared that "citizenship does not give [Americans] an immunity to commit crime in other countries," and "[w]hen an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and punishment as the laws of that country may proscribe for its own people." *Neely v. Henkel*, 180 U.S. 109, 123 (1901). For this reason, surrendering an individual already on foreign soil may be denied only if the foreign sovereign has entered into an agreement so providing. See *Wilson v. Girard*, 354 U.S. 524, 529 (1957).

But even in traditional extradition cases, where the judicial role is well settled, the Rule of Non-Inquiry limits habeas review to the questions whether the Executive has complied with the applicable statute or treaty that authorizes extradition, and whether there is sufficient probable cause to support extradition. Courts steadfastly avoid interfering with key functions of the Executive Branch by refraining from judging another country's "law enforcement procedures and its treatment of prisoners."

Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990); see generally Gov't Br. 34-41. It follows, *a fortiori*, that courts would exercise the same restraint, if not more, in dealing with individuals, like Omar, who are captured in the very foreign country in which they have committed offenses.

Accordingly, given that no statutory or treaty authority is necessary when, as here, an individual is already within the transferee's sovereign territory, and Omar's *only* complaint about being turned over to Iraq is his claim that he might be tortured by the new Iraqi Ministry of Justice, the Rule of Non-Inquiry leaves nothing for a court to adjudicate here. As we have explained, that is true in the extradition context where such objections ordinarily arise. See, *e.g.*, *Sidali v. INS*, 107 F.3d 191, 195 n.7 (3d Cir. 1997) ("[I]t is the function of the Secretary of State – not the courts – to determine whether extradition should be denied on humanitarian grounds."); accord *Ahmad*, 910 F.2d at 1067 ("The interests of international comity are ill-served by requiring a foreign nation * * * to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced. * * * It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds."); *Escobedo v. United States*, 623 F.2d 1098, 1107 (11th Cir.) (refusing to hear claim that extradition will lead to torture, because "the degree of risk to [petitioner's] life from extradition is an issue that properly falls within the exclusive

purview of the executive branch."), *cert. denied*, 449 U.S. 1036 (1980). And, if anything, the extraordinary circumstances in which this case arises only underscore that it is the province of the Executive – and not the courts – to determine whether the release of Omar to Iraqi authorities for possible prosecution is appropriate, or should be withheld on "humanitarian grounds."

Petitioners nevertheless contend that this case is different because Omar's asserted due process rights will be violated if he is transferred to the Iraqi criminal court system. See Pet Br. 43-44. But courts have consistently rejected this very type of contention. For example, in *Neely*, 180 U.S. at 122, the petitioner alleged that, if he were extradited, he would lose important constitutional rights, including "the fundamental guarantees of life, liberty, and property embodied in [the Constitution]." The Supreme Court's answer was simple and unequivocal: "[T]hose provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." *Ibid*. The same is true of *Holmes*, 459 F.2d at 1214, where numerous violations of constitutional norms were unsuccessfully alleged. Petitioner's suggestion (at 42) that *Neely* and *Holmes* are distinguishable because "minimal guarantees of due process" were present in both cases is mistaken. As here, the petitioners in both *Neely* and *Holmes* alleged that constitutional rights had, or

would be, denied by the transferee government, but the courts nonetheless refused to entertain those claims.

III. BECAUSE TRANSFER TO IRAQI AUTHORITIES WOULD PROVIDE FULL RELIEF FOR OMAR, IT CANNOT BE ENJOINED.

The district court exceeded its jurisdiction by forbidding the United States (and apparently the MNF-I) from transferring Omar to Iraqi custody, as such a transfer would provide him all of the relief to which he might be entitled through a writ of habeas corpus. See Gov't Br. 57-59. Petitioners concede that a court could not enjoin U.S. or multinational forces from releasing him from custody in Iraq, Pet Br. 47-48, although the district court did precisely that here, see JA 161. The reason for this concession is that such a release would provide all of the relief that the court would otherwise have been empowered to grant pursuant to a habeas writ. Transfer to Iraqi custody would similarly grant all of the relief allowed because it would terminate Omar's custody by United States military officers and place him in the custody of a foreign sovereign – a sovereign that would have jurisdiction over Omar whether he was transferred directly to their control or merely released in Baghdad.

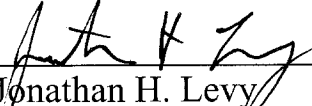
Omar claims that this foreign sovereign will "likely torture" him, Pet Br. 45,⁷ but admits that, if he were released by the MNF-I, he would be subject to arrest by Iraqi authorities, see Pet Br. 48. And, of course, petitioners do not (and cannot) contend that a United States court could remedy any mistreatment by the Iraqi government if it were to occur. Thus, there is no meaningful difference in this case between release and transfer to Iraqi custody with respect to any potential harm that can be redressed through a habeas writ. It was therefore improper for the district court to enjoin any release and transfer under the guise of ensuring that the habeas action challenging U.S. and MNF-I custody does not become "prematurely moot."

⁷ As we noted before the district court, this claim is poorly supported and highly suspect. Petitioners rely on claimed misconduct in detention centers operated by the Iraqi Ministry of the Interior, see Pet Br. 5-6, while Omar, if convicted, would be transferred to an Iraqi Ministry of Justice facility, see JA 141. And the declarations petitioners submitted in the district court (JA 104-107) are vague and facially flawed.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July 2006, I filed and served the foregoing Appellants' Reply Brief by causing the original and fourteen copies to be sent to this Court by hand delivery, and by causing two copies to be served upon the following counsel by Federal Express overnight:

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